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| GMAC BANK, a Utah Industrial Bank | : | CIVIL ACTION |
| | : | |
| Plaintiff, | : | |
| | : | |
| VS. | : | |
| | : | |
| | : | |
| HTFC CORPORATION, | : | |
| | : | |
| Defendant. | : | No. 06-5291 |

I. INTRODUCTION

{00188681;v2}

II. FACTS

On September 26, 2007 and November 8, 2007, counsel for GMAC Bank attempted to conduct the deposition of Wider. Throughout the course of Wider's deposition, he repeatedly used profanity, improperly refused to answer questions asked by GMAC Bank's counsel and/or provided evasive and incomplete answers. In fact, there were several occasions when HTFC's own counsel instructed Wider that he could answer questions posed by GMAC's counsel, yet he refused. Wider was also disrespectful and rude to others in the room through his threatening and abusive demeanor and his frequent use of profanity. Wider's behavior and continued use of profanity ultimately became so outrageous that it made the court reporter uncomfortable and GMAC Bank's counsel suspended the deposition. (See Exhibit "A" with portions of the Deposition of Aaron Wider dated September 26, 2007 and November 8, 2007 ("Wider Dep."), pp. 405 - p. 439, which caused counsel for GMAC Bank to adjourn the deposition.)

Wider refused to answer questions that go to the very core of GMAC's claims and HTFC's counterclaims. For example, one basis for GMAC's demand that HTFC repurchase loans previously sold to GMAC is that the loans were not the result of arms-length transactions. Wider simply refused to answer any questions regarding these loans. (See e.g. Exhibit "B" Wider Dep. p. 12, line 4 – p. 16, line 25; p. 26, line 2 - p. 30 – line 25; p. 64, line 3 – p. 69, line 7; p. 70, line 9 – p. 71, line 22; p. 93, line 5 – p. 98, line 20; and p. 250, line 21 – p. 259, line 3.)

Likewise, in its counterclaim, HTFC claims that it was unable to sell loans it had originated into the secondary market because of harm to its reputation allegedly caused by GMAC. However, when questioned as to what institutions HTFC attempted to place the loans in question, Wider refused to answer. (See e.g. Exhibit "C" Wider Dep. p. 359, line 13 – p. 372, line 9.)

III. ARGUMENT

A. GMAC Bank is Entitled to an Order Compelling Aaron Wider's Deposition

GMAC is entitled to an Order compelling the deposition of Aaron Wider and compelling him to answer the questions he improperly refused to answer and/or provided evasive and incomplete answers to at this previous depositions. The Federal Rules give a party the right to make a motion to compel a deposition when the deponent: 1) refuses to answer questions or provides evasive or incomplete answers during the deposition; or 2) acts in bad faith or in such a manner as unreasonably to annoy embarrass, or oppress the moving party during the deposition. See F.R.C.P. 37(a)(2); F.R.C.P. 30(d)(4)¹; Hearst/ABC –Viacom Entertainment Servs. v. Goodway Mktg., Inc., 145 F.R.D. 59, 63 (E.D. Pa. 1992) (holding that a motion to compel may be filed when a witness improperly refuses to answer deposition questions).

As the portions of Wider's deposition transcript attached hereto as exhibits to this Motion plainly demonstrate, Wider inappropriately and repeatedly used profanity, refused to answer questions asked by GMAC Bank's counsel, and/or provided evasive or incomplete answers and his outrageous behavior ultimately required GMAC Bank's counsel to suspend the deposition. For these reasons, GMAC Bank is entitled to an Order compelling Wider to appear for another deposition and provide complete and meaningful responses to the questions asked of him.

¹ Rule 30(d)(4) provides that "[a]t any time during a deposition, on motion of a party . . . and upon a showing that the examination is being conducted in bad faith or in such a manner as unreasonably to annoy embarrass, or oppress the deponent or party . . . the taking of the deposition must be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

B. GMAC Bank is Entitled to its Attorney's Fees and Costs

GMAC Bank is also entitled to the attorney's fees and costs it incurred in taking Aaron Wider's previous depositions as well as making this motion. F.R.C.P. 37(a)(4) provides:

If the motion is granted . . . the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion . . . to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

F.R.C.P. 37(a)(4)(A).

The provisions of F.R.C.P. 37(a)(4) also apply to an award of expenses incurred in relation to bringing a motion to compel when a party is forced to suspend a deposition due to another party's bad faith or intent to unreasonably annoy, embarrass, or oppress the moving party. See F.R.C.P. 30(d)(4); Biovail Laboratories, Inc. v. Anchen Pharmaceuticals, Inc., 233 F.R.D. 648, 653 (C.D. Cal. 2006); Higginbotham v. KCS Intern., Inc., 2002 F.R.D. 444, 458 - 459 (D. Md. 2001); Oleson v. Kmart Corp., 175 F.R.D. 570, 573 (D. Kan. 1997).

An award of expenses pursuant to F.R.C.P. 37(a)(4) is mandatory unless the either the movant failed to confer with the respondent in good faith prior to filing the motion or the losing party is able to demonstrate that its conduct was "substantially justified." See Australian Gold, Inc. v. Hatfield, 436 F.3d 1228, 1244 (10th Cir. 2006).

In this case, GMAC Bank's counsel has made a good faith effort to resolve the disputes at issue in this motion. Further, as even a cursory review of Wider's deposition transcript demonstrates, Wider's behavior was so outrageous that there can be no "substantial justification"

for his actions. As such, GMAC Bank is entitled to the attorney's fees and costs that it incurred in taking the deposition and bringing this Motion.

C. GMAC Bank is Entitled to Judgment Against HTFC in the Event That it Refuses to Comply With the Court's Order Compelling the Deposition

In the event HTFC refuses to comply with the Court's Order compelling Mr. Wider's Deposition, the Court has broad discretion pursuant to Rule 37(b) to impose any sanctions that it deems to be appropriate, including rendering judgment against the disobedient party. See Rule 37(b)(2)(C). Rule 37(a)(3) provides that an evasive or incomplete answer is to be treated as a failure to answer or disclose, which results in a judgment in favor of the moving party. See Dotson v. Bravo, 321 F.3d 663, 667 (7th Cir. 2003) (holding that evasive or incomplete answers can support dismissal of the entire action); International Broth. of Elect. Workers, Local Union 545 v. Hope Elec. Corp., 380 F.3d 1084, 1105 (8th Cir. 2004). Because of the outrageous nature of Wider's conduct at his deposition, GMAC Bank should be entitled to the entry of judgment against HTFC as to both GMAC Bank's Complaint and HTFC's Counterclaim if HTFC and Wider fail to comply with the Court's Order compelling Wider's deposition.

IV. CONCLUSION

For the foregoing reasons, Plaintiff GMAC Bank, A Utah Industrial Bank, respectfully requests that this Court grant its Motion to Compel the Deposition of Aaron Wider and any further relief deemed just and appropriate by the Court.

Dated: November 28, 2007

KLEINBARD BELL & BRECKER LLP

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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| GMAC BANK, a Utah Industrial Bank | : | CIVIL ACTION |
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| Plaintiff, | : | |
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| vs. | : | |
| | : | |
| | : | |
| HTFC CORPORATION, | : | |
| | : | |
| Defendant. | : | No. 06-5291 |

CERTIFICATE OF SERVICE

I, MELISSA C. PRINCE, hereby certify that on the 28th day of November 2007, a true and correct copy of the foregoing Motion to Compel the Deposition of Aaron Wider and accompanying Memorandum of Law have been filed electronically and are available for viewing and downloading from the ECF system. I further certify that I caused a true and correct copy of the same to be served upon the following counsel via electronic filing:

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